United States Court of Appeals

for the Second Circuit

APPELLANT'S REPLY BRIEF

77-1085

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA, :

Appellee. :

-against- : Docket No. 77-1085

FRANK MOTEN, :

Defendant-Appellant. :

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

REPLY BRIEF

IVAN STEPHAN FISHER
ATTORNEY AT LAW
400 ~~4XX~~ PARK AVENUE
NEW YORK, NEW YORK 10022

TABLE OF CONTENTS

Preliminary Statement 1

ARGUMENT:

The Government's Mass Trial Format, and Denial of Severance, Created Such Prejudicial Spillover as to Deny Defendants Due Process 2

Conclusion 19

TABLE OF CASES

Kotteakos v. United States, 328 U.S. 750 (1946) 13

Shaffer v. United States, 362 U.S. 511 (1960) 10, 14

United States v. Bertolotti, 529 F.2d 149 (2d Cir. 1975) 13, 18

United States v. Branker, 395 F.2d 881 (2d Cir. 1968) 10, 11, 16, 19

United States v. Butler, 494 F.2d 1246 (10th Cir. 1974) 16

United States v. Gambrill, 448 F.2d 1148 (D.C. Cir. 1971) 16

United States v. Kelly, 349 F.2d 720
(2d Cir. 1965) 11, 14, 16

United States v. Lam Lek Chong, 544 F.2d 58
(2d Cir. 1976) 12, 18

United States v. Miley, 513 F.2d 1191
(2d Cir. 1975) 12, 16, 18

United States v. Ricco, 549 F.2d 264
(2d Cir. 1977) 12

United States v. Shuford, 454 F.2d 772
(4th Cir. 1971) 16

United States v. Sperling, 506 F.2d 1323
(2d Cir. 1974) 17, 18

United States v. Stromberg, 268 F.2d 256
(2d Cir. 1959) 10

United States v. Varelli, 407 F.2d 735
(7th Cir. 1969) 16

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT
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Preliminary Statement

This brief is submitted on behalf of Appellant Frank Moten, in reply to specific arguments and statements made in the brief of Appellee United States of America. Failure to reply to a particular matter in the Government's brief means only that the matter has been sufficiently addressed in Moten's main brief or that it is insignificant with respect to the disposition of this case.

ARGUMENT

THE GOVERNMENT'S MASS TRIAL FORMAT, AND DENIAL OF SEVERANCE, CREATED SUCH PREJUDICIAL SPILLOVER AS TO DENY DEFENDANTS DUE PROCESS

The Government's utilization of the mass trial format, which aggregated some thirty-three defendants in one proceeding, denied due process to the twenty-two defendants ultimately placed on trial in this case, where pre-trial severance properly would have cured the prejudice that inhered in the massive spillover of testimony properly received only as to individual defendants.

Furthermore, the denial of severance was all the more deleterious in this case, where the Government, by its belated filing of a Nolle Prosequi as to three severed defendants one month after the conclusion of trial, implicitly conceded its initial impropriety in improperly joining thirty-three defendants in such an unwieldly and unmanageable prosecutorial format.

Virtually every defendant moved pre-trial for severance in this case, raising substantial arguments supporting their conclusion that the indictment was not only so unwieldly in terms of numbers of easily separable and discrete subgroups sought to be prosecuted, but that,

moreover, in light of the substantial likelihood that significant items of inherently prejudicial testimony admissable only as to individual defendants would be brought out at trial, all defendants would be prejudiced by the massive spillover likely to occur in a trial involving the activities of more than fifty defendants and co-conspirators covering a broad geographic range throughout the country and spanning a period of more than seven years.

The Government argued at that time, as it does now, that severance was inappropriate in this case, as only one massive conspiracy was alleged, and that, irrespective of any prejudicial spillover likely to occur in such a mass trial format, where testimony limited to twenty-two or more individual participants was to be admitted over the course of a thirteen week trial, such testimony could not be deemed prejudicial despite the substantial likelihood that the jurors could not properly separate and assess the specific involvement of twenty-two individual defendants.

Such an argument is transparent sophistry. In the first place, the Government itself belatedly conceded its impropriety in having initially indicted thirty-three individuals who were, at best, loosely connected in this diffuse and

and discrete criminal enterprise. While having argued strenuously, and erroneously, in the District Court against pre-trial severance of the defendants, on the grounds that one unitary conspiracy was alleged, and that, moreover, only limited testimony was to be admitted only as to individual defendants, the Government belatedly conceded post-trial that its initial prediction had by no means been accurate.

On December 28, 1976 -- one month post trial -- the Government filed a Nolle Prosequi against defendants Capra, Della Cava and Guarino -- who had been severed pre-trial over the Government's objection. Among the reasons asserted for discontinuance of this prosecution against defendants it had fought so strenuously to keep in its initial prosecution, the Government admitted, for the first time:

> ...Certain wiretap evidence against the co-defendant[s]...who remain to be tried is inadmissable against the defendants CAPRA, GUARINO and DELLACAVA, and would be prejudicial if admitted in a joint trial even with limiting instructions. Consequently, severance and a third trial may be required to permit the Government to introduce this evidence against the codefendants...
>
> United States v. Capra, Dkt. No. 76 Cr. 324 (S.D. N.Y. December 28, 1976) (Nolle Prosequi).

For the Government thus to continue to argue -- despite its own concession to the contrary -- that substantial prejudice did not inhere in the mass trial of twenty-two defendants as to whom substantial prejudicial evidence was admitted limited to specific defendants, which would not have been admissable at smaller individual trials, is disingenuous in the extreme.

Indeed, the course of this trial is the clearest refutation of the Government's bald claim that the massive quantities of limited testimony admitted as to various of the twenty-two defendants caused no confusion, as the jury obviously began to aggregate the activities charged against specific individuals and to impute them to all defendants, despite the trial court's admonition that guilt was individual and was limited strictly to the time period charged in the indictment (1968-1975).

Over repeated objection, extensive testimony was admitted as to co-conspirator Jack Brown's alleged narcotics dealings with various of the defendants dating back to the 1950's, despite the indictment's limitation of acts chargeable as dating back only to 1968.

Brown's testimony as to defendants Moten and Sebastian Intersimone was particularly prejudicial and damaging in this regard. Intersimone, alleged by the Government to have been a major supplier of heroin, was subjected to enormous amounts of testimony outlining narcotics transactions dating back to 1959 as well as various sales of heroin during the mid-1960's that significantly antedated the starting point of the conspiracy (Tr. 999-10 ; 1043).

Were this pre-conspiracy testimony not damaging enough, it was drawn into sharp relief by the fact that the Government's proof as to Intersimone's overall participation in the conspiracy proper was limited strictly to a single transaction occurring either in 1970 or 1971, leading ineluctably to the conclusion that the Government chose to utilize such "limited testimony" solely for the purpose of bolstering what was a weak case by attempting to prejudice Intersimone -- and, by extension, all of his codefendants -- with testimony that was properly inadmissable as to all other defendants.

Similarly, massive amounts of pre-conspiracy testimony was admitted as to Moten concerning his involvement with Brown dating from the mid-1950's (Tr. 1243-47; 1260); as well as the mid-1960's, after Brown was released from prison and again was plying the narcotics trade, despite Moten's attempts to establish him in legitimate business activities (Tr. 1248-1251).

Moreover, such "limited" testimony was repeatedly admitted as to virtually all twenty-two of the defendants regularly over the course of the trial. Indeed, in the case of defendants such as Intersimone, far more preconspiracy testimony was elicited and placed before the jury than acts in furtherance of the conspiracy proper.

While such testimony might properly have been admissable against individual defendants in a smaller-scaled trial, despite its inherently prejudicial impact, where such testimony was admitted on a regular basis over the course of thirteen weeks against twenty-two individual defendants, the spillover effect that is bound to take place obviously had its impact upon a jury bombarded with so much "limited" testimony, over so lengthy a period of time.

Thus, evidence was repeatedly admitted as to Brown's 1966 dealings with William Hightower (Tr. 1160); 1967 dealings with Joseph Sampson (Tr. 1169) and Solon Glaze (Tr. 1183); and 1965 dealings with L. J. Mitchell (Tr. 1134), as well as Brown's 1967 cocaine purchases from Angel Rodriguez (Tr. 1050).

In addition, significant testimony was elicited concerning narcotics transactions by James Laws as early as 1962 and 1965 (Tr. 5789-99) and by "Papers" Morris and Glaze dating back to the mid-1950's (Tr. 4661-64; 4675-77).

Furthermore, innumerable non-conspiracy related narcotics activities on the part of individual defendants, both within and without the relevant time period of the conspiracy, were repeatedly placed before the jury, improperly prejudicing all defendants by tarring them with alleged narcotics transactions having no direct relation to the conspiracy with which they were charged.

Thus, extensive testimony was admitted concerning wholly unrelated Washington, D.C. barbershop heroin transactions involving Hightower and Sidney Foster in the late 1960's, which bore no direct relationship with the conspiracy

proper (Tr. 5764-76). Moreover, testimony as to two heroin transactions involving Lois Sampson, wholly unrelated to the co-conspirators or the conspiracy alleged was admitted over repeated objection (Tr. 4554-56; 5639-43). Testimony was also adduced concerning an unrelated heroin sale involving Albert Lee Jones in 1971 (Tr. 5715-18; 5692), for which he was arrested on unrelated charges.

Furthermore, the jury was informed improperly of Tommy Davis' arrest and subsequent guilty plea on unrelated state drug charges, which, while arguably probative of Davis' relationship with Brown, bore no relationship whatever to Davis' alleged participation in the conspiracy charged (Tr. 5601-9; 5633-38).

The above listing is but a small sample of the innumerable instances in which evidence properly limited to individual defendants was admitted regularly as to one or another of the twenty-two defendants on trial over the course of thirteen weeks, to the point where the jury could not reasonably be expected to differentiate the guilt of one defendant from another or even to demark the extent of preconspiracy evidence from that properly considered in relation to the conspiracy proper.

Indeed, as this Court has written in United States v. Branker, 395 F.2d 881 (2d Cir. 1968), in decrying "the prejudice inherent in any mass trial":

> This kind of prejudice is particularly injurious to defendants who are charged in only a few of the many counts, who are involved in only a small proportion of the evidence, and who are linked with only one or two of their co-defendants. The jury is subjected to weeks of trial dealing with dozens of incidents of criminal misconduct which do not involve these defendants in any way. As trial days go by, "the mounting proof of the guilt of one is likely to affect another." Schaeffer v. United States, 362 U.S. 511, 523 (1960) (Douglas, J., dissenting). Id., 395 F.2d at 888.

Clearly, then, as the trial in this case dragged on far beyond the two to three month point, with limited testimony admitted as to one or another defendant on an almost daily basis, the cumulative prejudice to each defendant, whether or not his involvement was mentioned, grew more and more apparent with each passing day. United States v. Stromberg, 268 F.2d 256, 264 (2d Cir.), cert denied, 361 U.S. 863 (1959).

Such cumulative prejudice, and its inexorable build-up, has not gone unrecognized by this Court, in circumstances such as this, where, by virtue of its election of the mass trial format, the Government has suffered innumerable

defendants to sit through literally weeks of trial at which their involvement was only peripherally alluded to, and where, indeed, there exists the virtual certainty that, in the minds of the jury, various of the defendants were, in fact, being tried for the acts of co-conspirators rather than for their own involvement in the conspiracy alleged. United States v. Branker, supra, 395 F.2d at 887-8.

Under similar circumstances, in United States v. Kelly, 349 F.2d 720 (2d Cir. 1965), cert. denied, 384 U.S. 947 (1966), this Court reversed the conviction of a codefendant, who, as in the instant case, was unfairly tarred with the acts of alleged conspirators rather than for his own alleged criminal involvement, the Court finding that the inherent spillover from testimony regarding his codefendants necessitated severance:

> The principal and inevitable prejudice, however, was caused by the slow but inexorable accumulation of evidence of fraudulent practices by Shuck's codefendants...That some of this rubbed off on Shuck we cannot doubt. When this accumulation reached its peak...it is clear to us that the motion then made by counsel for Shuck for a severance should have been granted. It was an abuse of judicial discretion to

deny the motion for a severance at that time.

Id., 349 F.2d at 759.

What is critical, therefore, in the context of this trial, is the fact that the number of discrete and separable conspiratorial subgroups and individual coconspirators tried in tandem was so large, and the sheer volume of evidence elicited so enormous, that it was realistically impossible for the jury properly to weigh the evidence against each defendant on an individual basis. United States v. Lam Lek Chong, 544 F.2d 58, 66 (2d Cir. 1976); United States v. Stromberg, supra.

Moreover, even those cases cited by the Government in an attempt to minimize the prejudice suffered by the defendants herein pale by comparison with the sheer numbers of defendants and coconspirators charged, and the enormity of evidence introduced, in this much vaunted display of prosecutorial overkill. Cf. United States v. Lam Lek Chong, supra (three defendants tried, six coconspirators, two conspiracies, at most); United States v. Ricco, 549 F.2d 264, 271 (2d Cir. 1977) (twelve defendants charged, five tried, 3 coconspirators, two conspiracies, at most); United States v. Miley, 513 F.2d 1191, 1209

(2d Cir. 1975) (nine defendants charged, five tried, three conspiracies, at most).

These simply-structured cases stand in sharp contrast with the mass trial conducted here, where thirty-three defendants were charged, and twenty-two defendants tried, on a forty count indictment charging the involvement of some fifty or more defendants and coconspirators, in a far-flung and loosely-connected series of transactions extending over a period of seven years and involving discrete and separable conspiratorial subgroups located in Miami, Chicago, Washington, D.C., and New York. Compare, United States v. Bertolotti, 529 F.2d 149 (2d Cir. 1975) (seventeen defendants tried, four conspiratorial subgroups, convictions reversed); Kotteakos v. United States, 328 U.S. 750 (1946) (thirty-six defendants charged, thirteen tried, eight conspiratorial subgroups, convictions reversed).

Clearly, it was the continuing responsibility of the trial judge, in evaluating defendants' numerous requests for severance, both before and during trial, to have granted such severance as soon as the full extent of the prejudicial spillover became apparent during trial, particularly where severance requests were renewed with regularity (e.g., Tr.

5633-38; 5715-18). See Schaffer v. United States, 362 U.S.511, 516 (1960); United States v. Kelly, supra, 349 F.2d at 759.

In this case, the grounds for severance were compelling. As discussed, supra, prejudicial pre-conspiracy activities limited to individual defendants were placed before the jury on an almost daily basis over the course of the thirteen weeks of trial (e.g., Sampson, Hightower, Mitchell, Morris, Glaze, Cowpers, Rodriguez, Laws, Moten, Intersimone), to the point where, as to some defendants (e.g., Intersimone), more preconspiracy evidence was admitted than testimony concerning the conspiracy proper.

Moreover, various offers of proof by the Government were admitted on a limited basis in order to demonstrate the existence of discrete conspiratorial relationships among various of the individual defendants and coconspirators, separate and apart from their involvement in the conspiracy proper, further adding to the jury's confusion in attempting to differentiate twenty-two individual's involvement in what the Government disingenuous characterized as only one over-arching

conspiracy (e.g., testimony as to the existence of a separate relationship between Morris, Glaze and Mitchell, Tr. 5631-33).

Furthermore, and most compelling, was the Government's own post-trial admission, in its Nolle Prosequi of the Capra Trio, supra, that, contrary to its assertions in opposition to defendant's pre-trial severance motions, it had, in fact, improperly joined several defendants as to whom it could not reasonably have proceeded to trial in the same proceeding with various of the other defendants named herein because of precisely the same problems which materialized at the instant trial - the admission of specific evidence against certain codefendants which would be prejudicial if admitted in a joint trial, even with limiting instructions. Indeed, given the Government's experience with the instant trial, its assertion in the Capra Nolle Prosequi, was tantamount to an admission that it had, indeed, misjoined innumerable other defendants as to whom such "limited" evidence caused incalculable prejudice.

The Government, thus, has all but conceded that the thirty-three defendants initially indicted were, in

fact, improperly joined in one proceeding, in which it has admitted it could not try all defendants at once, given the prejudicial evidence admissable as to certain defendants, but wholly improper as to others.

Such a post-trial concession, in the face of a protracted thirteen week trial and the difficulties of appellate review of the denial of severance, has on more than one occassion earned the scorn of appellate courts, particularly in light of the precisely articulated severance requests previously resisted by the Government. United States v. Miley, supra, 513 F.2d at 1209 (Friendly, J.); United States v. Kelly, supra, 349 F.2d at 759; United States v. Branker, supra, 395 F.2d at 889; See also, United States v. Butler, 494 F.2d 1246, 1256 (10th Cir. 1974); United States v. Shuford, 454 F.2d 772, 776 (4th Cir. 1971); United States v. Gambrill, 449 F.2d 1148, 1162 (D.C. Cir. 1971); United States v. Varelli, 407 F.2d 735, 747-8 (7th Cir. 1969).

Moreover, the Government's attempted distinction of United States v. Sperling, 506 F.2d 1323 (2d Cir. 1974), cert. denied, 423 U.S. 962 (1975), by purporting to limit its ambit to the multiple conspiracy context, is clearly unavailing.

While Sperling does allude to the obvious problem inherent in requiring conspiracy cases to be tried one defendant at a time, this Court made clear that its primary concern was the difficulty it encountered at the appellate level in combing a voluminous record to give adequate consideration to the claims of a dozen or more appellants linked in tandem, where the criminal acts charged reasonably could have been regarded as two or more distinct and manageable subgroups. Id., 506 F.2d at 1340.

Such an analysis points to the obvious resolution of the instant case. The Government easily could have avoided administrative and logistical difficulties it imposed upon the defendants, and the trial court, by having indicted and prosecuted these defendants in smaller conspiratorial subgroups, as was suggested by Sperling, and indeed, was requested by all defendants, who demonstrated pre-trial that the Government's unwieldly single conspiracy format,

was easily severable into four distinct conspiratorial subgroups, which would not merely have proceeded far more efficiently at the trial level, but, more importantly, would have avoided the massive spillover of unrelated evidence that, in fact, occurred (see Moten's main brief at 5-10).

Instead, proceeding in flagrant violation of this Court's repeated warnings in the Sperling-Miley-Bertolotti trilogy, the Government chose to subject the defendants, and the court, to the circus-like spectacle of two dozen defendants forced to trial in the expectation that even the most peripheral defendant would, indeed, be swept away in the vortex of guilt by association. United States v. Lam Lek Chong, supra, 544 F.2d at 67.

Clearly, this Court's hortatory warnings have proven insufficient to disabuse the Government of its persistent penchant for casting indictments on such a massive and far-flung basis. Indeed, in reversing a similar conviction, almost ten years ago, this Court voiced what has come to be an almost hollow admonition regarding prosecutorial discretion under these circumstances:

> If the prejudice of joint trial is to be eliminated without the waste of time

> and energy which results from a joinder which is declared improper in the midst of trial, or, as here, on appeal, we must rely on the responsibility and good judgment of the prosecutors (citations omitted).
>
> United States v. Branker, supra, 395 F.2d at 889.

As this case glaringly demonstrates, this Court's continued reliance on the Government's responsibility and good judgment must, at last, finally come to an end. The convictions should be reversed and the indictments dismissed.

CONCLUSION

For the foregoing reasons, and for the reasons set forth in Moten's main brief, the convictions must be reversed and the indictments dismissed.

Dated: New York, New York
June 1, 1977

Respectfully submitted,

IVAN S. FISHER
Attorney for Appellant
Frank Moten
400 Park Avenue
New York, New York 10022
(212) 355-2380

Edward M. Chikofsky
Of Counsel

C 321—Affidavit of Service of Papers by Mail.
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Index No. 77-1085

UNITED STATES OF AMERICA

~~Plaintiff~~

against

FRANK MOTEN

~~Defendant~~

AFFIDAVIT OF SERVICE
BY MAIL

STATE OF NEW YORK, COUNTY OF ss.:

The undersigned being duly sworn, deposes and says:

Deponent is not a party to the action, is over 18 years of age and resides at
69-84 137 STREET, Flushing, N.Y. 11367

That on June 1, 1977 deponent served the annexed
Reply Brief
on Robert B. Fiske, Jr., U.S. Atty, S.D.N.Y.
attorney(s) for Appellee
in this action at One St. Andrews Plaza, N.Y., N.Y. 10007
the address designated by said attorney(s) for that purpose by depositing a true copy of same enclosed in a postpaid properly addressed wrapper, in—a post office—official depository under the exclusive care and custody of the United States Postal Service within the State of New York.

Sworn to before me this 1st Day of June, 1977

Edward M Chikofsky
EDWARD M. CHIKOFSKY
NOTARY PUBLIC - STATE OF N.Y.
No. 31-9821444
Qualified in N.Y. County
Comm. Exp. 3-30-78

Judith Gerowitz

The name signed must be printed beneath

Judith Gerowitz